UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/765
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 765

Case No. 837: ANDERSON BIELER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Ngaire Anderson Bieler, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 15 April, 31 July, 31 October 1993, 31 January, 29 April, 31 July, 31 October 1994, and 31 January 1995;

Whereas, on 31 January 1995, the Applicant filed an application requesting that the Tribunal:

"...

1. Find that the Secretary-General, by delaying the selection of an applicant for Post No. 91-P-PSC-287-NY (Senior Political Affairs Officer) for eight months after applications had been received, denied the Applicant the possibility of promotion under the vacancy management rules according to the provisions of ST/AI/338/Add.2 ...

2. Find that the Secretary-General failed to act in accordance with the provisions of ST/SGB/237, paragraph 5 ...

[relating to filling posts by female candidates]

...

6. Uphold the unanimous decision of the Joint Appeals Board by awarding the Applicant monetary damages in an amount equal to the higher salary she would have received had she been promoted, together with a lump sum reflecting the actuarial difference in her pension in view of her non-promotion. In any event, damages for moral injury in the amount of six months salary should be awarded to the Applicant."

Whereas the Respondent filed his answer on 6 June 1995;

Whereas the Applicant filed written observations on 31 October 1995;

Whereas, on 10 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 12 and 23 July 1996;

Whereas, on 22 July 1996, the presiding member of the Panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations in March 1960, as a Guide-Trainee, on a three-month fixed-term appointment. She served on further fixed-term appointments as a Guide and Dispatcher in the Visitors Service, External Relations Division (ERD), Department of Public Information (DPI), until 30 September 1965. On 1 January 1966, she was employed as a Clerk in the Visitors Service on a fixed-term appointment of three months, at the G-3, step IV level. She resigned, with effect from 19 May 1967. On 23 September 1970, the Applicant re-entered the service of the Organization as a Guide Training and Briefing Officer in DPI at the P-1 level, on a probationary appointment which became permanent on 1 September 1972. On 1 April 1973, she was promoted to the P-2 level, as Associate Information Officer, and on 1 June 1978, she was promoted to the P-3 level, as Chief, Guided Tour Unit. On 1 April 1985, she was promoted to the P-4 level. From 18 October 1990 to 17 February 1991, the Applicant was temporarily assigned from the Presentation, Press and Publicity Division, DPI, to the Security

Council and Political Committees Division (SCPCD), Department of Political and Security Council Affairs (PSCA), against a P-5 post. The Applicant was paid a special post allowance at the P-5 level, with effect from 18 January 1991 until 31 January 1993, when the Applicant retired, having been retained in service beyond the retirement age, which she reached on 31 May 1992.

In response to a vacancy announcement, the Applicant applied, on 20 May 1991, for the P-5 post of Senior Political Affairs Officer in the Secretariat of the Arms Embargo Committee, Office of the Director, SCPCD, PSCA. The post was to become vacant upon the retirement of its incumbent, who reached the statutory age of retirement in September 1991. His appointment was extended until 31 October 1991. On 12 December 1991, the Applicant was notified that she had been short listed for the post along with two other staff members. On 23 January 1992, the Applicant was informed that a staff member other than herself had been selected for the post.

On 27 January 1992, the Applicant requested the Secretary-General to review the decision not to appoint her to the post. She noted "the provisions of ST/SGB/237 concerning the status of women in the Secretariat" and stated "I understand that both of the other names short-listed were men." On 12 March 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) and requested suspension of action on the decision appealed.

On 26 March 1992, the JAB adopted its report on the request for suspension of action. It concluded that "as the successful candidate had already been placed in the post, it could not recommend a suspension of action". It, however, recommended that "no action be taken to promote the current incumbent of the P-5 post in question", pending the outcome of the appeal. The JAB also recommended that the Secretary-General "order special accelerated proceedings in this appeal". On 21 May 1992, the Officer-in-Charge, Department of Administration and Management, transmitted the JAB report to the Applicant and informed her that the Secretary-General

"has concluded that the contested decision was already implemented with the selection and placement on the post of another staff member who was found to have also met all the requirements of the post and that, therefore, the Board's recommendation for suspension of action cannot be accepted."

On 27 August 1992, the JAB adopted its report on the merits of the appeal. Its considerations and recommendations read as follows:

"Considerations

15. The Appellant applied for the post in May 1991. Between that date and the date when a selection was made, in January 1992, eight months had elapsed. By then, the Administration alleges, it would have been too late to select the Appellant because she would not have met the requirement for officially assuming the post six months after the appointment date; by then she would have reached retirement age. The Panel, however, noted that, had the Administration not delayed taking action on this appointment, the Appellant would have been well within the necessary time for occupying the post.

16. The Panel recalled its recommendations in the suspension of action request brought by the Appellant in March 1992, and expressed concern that the Administration had not accepted the accelerated timetable that it had proposed for the review of this appeal. If the timetable had been adhered to, a decision on this appeal could have been taken before the promotion of the incumbent in the contested post became irrevocable. Now, the Panel was facing a fait accompli. The decision to delay the Respondent's reply until 17 June 1992 sent a clear message to both the Panel and the Appellant that the Administration did not want to offer even a theoretical chance of redress: the best the Appellant could now hope for was compensation after the fact.

17. The Panel concluded that had the Administration acted efficiently and taken action, the vacancy would have been filled by the Appellant; she was a most deserving candidate, and her selection would have achieved all the objectives set out in the Fifth Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and promulgated in ST/SGB/237. The Respondent's reply does not contest this assessment.

18. At this time, because there is no way to completely redress the situation, the Appellant having reached the statutory retirement age, the Panel considered the intangible damage that flows from the situation. In this case, the Organization has been the ultimate loser by not fully utilizing the potential of a highly qualified staff member. At the same time, it has converted the last years of the Appellant's career, which should have been the most rewarding, into a period of suffering, humiliation and disappointment with the Organization for which she has worked for over thirty years.

19. The Panel wishes to point out that there is a thin line here between the legal and moral issues. The fact remains that the Appellant has been precluded by the delaying tactics of her Department from selection for a post for which she was well qualified and this was done in violation of the spirit of the Secretary-General's directive. Moreover, the Appellant has been denied the satisfaction of ending her career with the dignity that would flow from the recognition of her abilities.

Recommendations

20. The Panel recommends that the Appellant be granted a valedictory promotion retroactively, to January 1992, the approximate date when she would have been promoted had the Administration followed its own rules. Thus, the spirit of the Secretary-General's decision taken in implementation of the Fifth Report of the Steering Committee would be respected.

21. Should the Secretary-General decline to grant this equitable relief, then the Appellant should be awarded monetary damages in an amount equal to the higher salary she would have received had she been promoted, together with a lump sum reflecting the actuarial difference in her pension in view of her non-promotion. In any event, damages for moral injury in the amount of three months salary should be paid to the Appellant."

On 15 October 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant the JAB report and informed her as follows:

"The Secretary-General has reexamined your case in the light of the Board's report. Bearing in mind that:

(i) No staff member has the right to be promoted, and that qualifications, experience, favourable performance reports and seniority do not give rise to any expectancy of promotion, valedictory or otherwise;

(ii) As evidenced by the inclusion of your name in the short-list drawn up by the Appointment and Promotion Board, you received full and fair consideration for the P-5 post for which you applied;

(iii) Although, under the provisions of ST/SGB/237, women candidates who match all the qualifications of a post are entitled to the benefit of special measures, it was a reasonable exercise of discretion by the Under-Secretary-General of the Department of Political and Security Council Affairs to select a candidate other than yourself for the post in question since, under the provisions of ST/AI/338/Add.2, your eventual promotion could not have been implemented before you had reached the statutory retirement age;

(iv) The Administration's processing of the applications for the vacant P-5 post in question was in strict compliance with the applicable rules and did not cause any undue delay;

(v) In accordance with the rules governing the Vacancy Management System, the selection of the successful candidate for the post in question created for him a legitimate expectation to be promoted six months after assuming the full functions of the higher-level post; that expectation could be defeated only if the department was unable to certify that the staff member had performed satisfactorily the functions of the higher-level post and if the Appointment and Promotion Board failed to endorse the promotion;

(vi) Compliance with the timetable recommended by the Board in a prior suspension of action proceeding would have served no useful purpose since your appeal was filed after the successful candidate had been selected for the post, and could in no way impinge upon that staff member's legitimate expectation of promotion to the level of that post,

the Secretary-General cannot accept the Board's recommendations on your appeal. He has decided to maintain the contested decision and to take no further action in your case."

On 31 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant met all of the requirements of the post for which she applied and, as a woman, she should have been selected for the post, in accordance with ST/SGB/237.

2. By extending the appointment of the incumbent of the post beyond his statutory retirement age, the Respondent failed to act in accordance with the generally accepted practice that extensions past retirement age not be given if they would block the promotion of another staff member.

3. The Respondent's refusal to accept the unanimous recommendations of the JAB contradicts his commitment to the policy of accepting unanimous JAB recommendations except where a major question of law or principle is involved.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to be promoted. The decision not to select the Applicant for the post in question was within the discretionary powers of the Respondent and did not violate the Applicant's rights.

2. The Applicant is entitled to the benefit of ST/SGB/237, but, in accordance with the Tribunal's jurisprudence, there is no resulting automatic right to promotion. The mere fact that in a particular case a male candidate was preferred over a female candidate does not demonstrate that the affirmative action measures were not applied.

3. The decision to extend the employment of the incumbent of the post in question beyond his statutory retirement age was within the discretionary authority of the Respondent and did not violate the Applicant's rights.

4. The decision not to accept the unanimous JAB recommendation in favour of the Applicant was within the Respondent's authority.

The Tribunal, having deliberated from 9 to 26 July 1996, now pronounces the following judgement:

I. The facts of this case do not appear to be in dispute. On 20 May 1991, the Applicant applied for the post of Senior Political Affairs Officer, under the Vacancy Management System then in force. This post was to become vacant in September 1991, when the incumbent would reach the statutory retirement age. Upon his reaching retirement age, the incumbent's appointment was extended to 31 October 1991, thus delaying selection of his replacement. In the context of the selection process, the Applicant was short-listed for the post, along with two male staff members. On 17 January 1992, one of the short-listed male staff members was selected for the post.

II. The Applicant contends that the Respondent's failure to select her for the post was not in accordance with the provisions of ST/SGB/237 which provides that:

> "... the following policy shall apply in the area of assignment and promotion:
>
> > In departments and offices with less than 35 per cent women at levels P-5 and above, vacancies overall and in the latter group, respectively, shall be filled, when there are one or more female candidates whose qualifications match all the requirements for a vacant post, by one of these female candidates."

The Department of Political and Security Council Affairs did not meet the percentages required by the Secretary-General's Bulletin.

The Tribunal notes the Joint Appeals Board's conclusion that:

> "Had the Administration acted efficiently and taken action, the vacancy would have been filled by the Appellant; she was a most deserving candidate, and her selection would have achieved all the objectives set out in the Fifth Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and promulgated in ST/SGB/237. The Respondent's reply does not contest this assessment."

III. The Respondent cites Judgement No. 671, Grinblat (1995) as disavowing any automatic right on the part of the Applicant to be promoted as a result of ST/SGB/237. The Tribunal wishes to clarify its ruling in Judgement No. 671. This judgement involved the application of ST/SGB/237 by the Appointment and Promotions Board (APB) in compiling the short list for a post prior to Departmental consideration of the list to determine who should fill the post. The Tribunal concluded that it was inappropriate for the APB to exclude equally qualified male applicants from short lists and that ST/SGB/237 should have been applied by the Department concerned.

IV. The Tribunal also found in Grinblat that the APB's application of ST/SGB/237 in compiling the short-list did not conform with UN resolutions and Article 101(3) of the Charter which provides that "the paramount consideration in the employment of the staff ... shall be the necessity of securing the highest standards of efficiency, competence and integrity ..." However, the Tribunal's finding only affected ST/SGB/237: "to the extent that the bulletin was interpreted as purporting to authorize the promotion of

candidates solely on the basis of gender if they merely met the requirements of the vacant post without regard to whether there were better qualified candidates for the post." (paragraph XV, emphasis added). This finding does not preclude the application of ST/SGB/237 to mandate the selection of women candidates when they are found to be equally qualified. Indeed, in Grinblat the Tribunal held that, although it would be impermissible to view Article 8 of the Charter, which provides for equal opportunity in United Nations employment, as overriding Article 101(3), at the same time Article 8 "must be regarded as a source of authority for reasonable efforts to improve the status of women". The judgement further noted "Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, ..."

V. Unlike Grinblat, the present case involves the application of ST/SGB/237 by the Department filling the post. The Tribunal reaffirms that the affirmative action measure establishes a right to preferential treatment for women whose qualifications "are substantially equal to the qualifications of competing male candidates" (Judgement No. 671, Grinblat, paragraph XIX) when the other requirements of ST/SGB/237 are met. The Applicant's qualifications were at least equal to those of the other candidates. Indeed, the Tribunal notes that the former Director, Security Council and Political Committees Division, stated that the Applicant "was the best qualified of the candidates in the short list" and that he would have indicated this had he been consulted on the appointment decision.

The Tribunal finds that, as the Applicant was the only woman short-listed for the post, and as she was equally, if not more, qualified for the post, she had a right to promotion, in the light of ST/SGB/237.

VI. The Applicant further contends that the delay in selection of a replacement for the vacant post for eight months after the applications for the post had been received denied her the possibility of promotion. The vacancy management rules provide that a promotion be implemented as of the beginning of the seventh month after the staff member has assumed the full functions of the higher-level post. By that time, the Applicant would have reached retirement age. But for the Administration's delay in the recruitment process, resulting in significant part, from the extension of the incumbent of the post beyond retirement age, the Applicant's promotion could have been implemented. The Respondent argues that eight months was not unreasonable in all the circumstances, yet he does not delineate the particular circumstances warranting the delay in the appointment. The Tribunal notes, in this regard, the comment by the former Director of the Political and Security Council Committees Division that the extension of the incumbent in the post beyond retirement age was not justified by exceptional circumstances and "did not serve the interests of the Organization."

VII. The Tribunal has held that denying promotion of a staff member because he or she was approaching retirement age violates principles of equity and fairness. (Judgement No. 483, Kleckner (1990), Judgement No. 690, Chileshe (1995)). Similarly, in this case, the Tribunal finds that the delay in the recruitment process, resulting in the selection of a staff member other than the Applicant, was inequitable and unfair, and deprived her of a promotion to which she was entitled.

VIII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant compensation in the amount of $10.00.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

Maria VICIEN-MILBURN
Executive Secretary